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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

EDUARDO A. MASFERRER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, chairman of a national bank, was convicted of engaging in a fraudulent swap transaction designed to conceal investment losses suffered by the bank. Petitioner was sentenced to a breathtaking 30 years in jail, based on two hotly contested sentencing facts that the district court found by a preponderance of the evidence: first, that Petitioner was legally responsible for false testimony given by two other individuals in 2002 (thus increasing Petitioner's sentence range by about 17 years); and second, that Petitioner had caused losses to shareholders and the bank exceeding $20 million (thus increasing Petitioner's sentence range by about 14 years). The court of appeals affirmed in all respects.

The questions presented are: .

1. Whether the Eleventh Circuit, in conflict with the Eighth and Ninth Circuits but consistent with the Third, Sixth and Seventh Circuits, erroneously declined to apply a standard higher than preponderance of evidence in determining facts that have a disproportionately large impact on sentencing.

2. Whether the Eleventh Circuit, in conflict with the Second, Fifth, and Ninth Circuits but consistent with the Eighth Circuit, erroneously declined to apply the loss causation principles articulated in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005), in determining "loss" under the Sentencing Guidelines.

PARTIES TO THE PROCEEDING

The petitioner, defendant-appellant below, is Eduardo A. Masferrer.

The respondent, plaintiff-appellee below, is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-11a) is reported at 514 F.3d 1158. The judgment of the district court (App. 12a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2008. The order denying rehearing (App. 16a-17a) was entered on March 28, 2008. On June 2, 2008, Justice Thomas granted an extension of the time to file the petition until July 26, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

Article I, section 9 of the Constitution of the United States provides, in pertinent part: "No Bill of Attainder or ex post facto Law shall be passed."

STATEMENT

Petitioner's 30-year sentence was based on two hotly contested findings that the district judge made only by a preponderance of the evidence:

First, the district court, affirmed by the court of appeals, found that Petitioner's criminal conduct

continued past November 1, 2001, the date on which the 2001 Sentencing Manual took effect. Although all of the substantive offenses charged in the indictment occurred before December 2000, and the swap transactions at the center of the case were publicly restated by the bank in December 2000, the district court, guided by only a preponderance standard, attributed to Petitioner the post-November 2001 perjury of his alleged confederates. That finding alone increased Petitioner's Guidelines range *by 17 years*.

Second, in calculating the "loss" caused by Petitioner's offense, the district court, again affirmed by the court of appeals, refused to consider the loss causation principles articulated by this Court in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005). As a result, the courts below found that petitioner's conduct – which quite likely caused *no* loss under *Dura* – in fact caused more than $20 million in losses to shareholders and the bank. That finding increased Petitioner's Guidelines range (under the 2001 Manual) *by more than 14 years*.

This case – and Petitioner's 30-year sentence – present two legal questions on which the courts of appeals are deeply divided: first, whether due process requires that facts having a disproportionate impact on sentencing be found by a heightened standard of proof; and second, whether *Dura* loss causation principles should be applied in criminal sentencing. The Eleventh Circuit declined to adopt a heightened standard of proof, and it refused to apply the principles in *Dura*. As a result, for the commission of a garden-variety fraud that quite likely caused no loss to anyone, Petitioner was given the functional

equivalent of a life sentence. This Court's review is plainly warranted.

A. Background

Petitioner Eduardo Masferrer was the Chairman of Hamilton Bank N.A. April 21, 2006 (am) Transcript ("Tr.") 62. In 1997 and early 1998, Hamilton Bank invested in foreign debt instruments that offered high returns. Among those investments were participations in large loans granted to Russian entities and syndicated by European financial institutions. May 4, 2006 (pm) Tr. 113-25, 132-34.

The Bank's investments in Russian loans proved to be ill-advised. In early Summer 1998, the Russian economy went into a steep slide, with a predictably severe impact on the viability of its financial institutions. May 5, 2006 (am) Tr. 4-9, 31-38. As a result, Hamilton Bank saw its Russian loan holdings fall precipitously to 15% or less of their face values. *Id.* at 58.

In the course of a September 1998 audit, the Office of the Comptroller of the Currency ("OCC") recommended that Hamilton Bank create a loan reserve of $3.125 million against the possibility of nonpayment of the Russian loans. April 21, 2006 (pm) Tr. 20-31. According to the government, Petitioner instead schemed to conceal the problems with the Russian loans by "swapping" them in September 1998 for certain Latin American and non-Russian loans and securities (the "Latin assets") at face value or "par," even though the Latin assets were selling at a significant discount. The government alleged that Petitioner thereafter caused the bank to violate accounting rules by mischaracterizing the swaps as

unrelated transactions, and bolstered that mischaracterization by persuading Chief Financial Officer John Jacobs and Executive Vice President Juan Bernace to give false testimony during a 1999 OCC investigation.

By late 2000, however, the scheme had come to an end: In December 2000, Hamilton Bank publicly acknowledged that the Russian loan and Latin asset transactions were related, and that the transactions had therefore not been properly accounted for on the company's books. May 3, 2006 (am) Tr. 102-12. The Bank restated its earnings and filed amended reports with the SEC. The restatement showed that Hamilton Bank had realized a pre-tax loss of $22.2 million on the Russian loans in the September 1998 sale. *Ibid.*

In 2001, the SEC initiated its own investigation of the Russian loan transactions. Petitioner invoked his Fifth Amendment rights in response to an SEC subpoena. Bernace and Jacobs testified before the SEC in 2002, and both asserted that the sale of the Russian loans and the purchase of Latin assets were unrelated. May 5, 2006 (pm) Tr. 200-01; April 26, 2006 (am) Tr. 634-36. There was no evidence that Petitioner had done anything to encourage either individual to give false SEC testimony.

B. The District Court Proceedings

After a first trial ended in a hung jury, Petitioner was retried in the United States District Court for the Southern District of Florida. On April 17, 2006, he was convicted on 16 counts alleging wire fraud, bank fraud, securities fraud, false statements to bank examiners, obstruction of an examination, and

conspiracy. Verdict Form, filed May 10, 2006. Although Petitioner had no prior offenses, the Presentence Report ("PSR") calculated a Sentencing Guidelines range of 360 months to life. The PSR based that determination – which the district court adopted in full – on two key propositions; Petitioner objected to each.

First, Petitioner objected to the PSR's use of the 2001 Guidelines Manual. See Masferrer's Objections to the Presentence Report ("Masferrer Objections") filed July 19, 2006, at 2-7; July 26, 2006 Tr. 2-19. The 2001 Manual was applicable only if Petitioner's offense had continued after November 2001, when the new Manual went into effect. As Petitioner pointed out, each of the substantive offenses of bank fraud, securities fraud, and false statements occurred in 1998 or 1999, and the obstruction offense occurred in November 2000. What is more, the government did not identify a single act that Petitioner personally committed after November 2000, much less November 2001. Rejecting those objections, the PSR attributed to Petitioner the false SEC testimony of Jacobs and Bernace in 2002.

Second, Petitioner objected to the PSR finding that he was responsible for more than $20 million in losses, both to the bank's shareholders and to the bank itself. Masferrer's Objections, at 9-13; July 26, 2006 Tr. 19-25. Relying on the Fifth Circuit's decision in *United States* v. *Olis*, 429 F.3d 540, 545-46 (5th Cir. 2005), which in turn had adopted the principles articulated by this Court in *Dura*, Petitioner contended that shareholder loss must be confined to those shareholders whose stock price was damaged by the alleged wrongdoing. As Petitioner explained –

and as the government itself had shown – there was a general decline in *all* bank stocks between 1998 and 2001.[1] Moreover, when Hamilton Bank restated its earnings relating to the Russian loan sales, the stock price had actually gone up. Petitioner challenged the determination of loss to the bank as well. As he explained, Petitioner was accused of seeking to conceal $20 million in losses that *already existed* in the Bank's Russian loan portfolio. Consequently, Petitioner contended, under the government's own theory, his conduct did not cause that loss to the bank. What is more, to whatever extent the swap transaction might be said to have caused a loss to Hamilton Bank by virtue of the bank's alleged $22 million overpayment for the Latin Assets, that overpayment was almost entirely offset by the bank's receipt of the $20 million overpayment by the counterparties for the Russian assets.

In a series of terse, oral rulings, the district court adopted the PSR in all respects. With respect to the use of the 2001 Sentencing Manual, the district court stated, "Well, I'm satisfied that the Probation Officers correctly applied the 2001 guideline manual." July 26, 2006 Tr. at 19. With respect to the loss calculation, the district court stated, "I'm satisfied and find that the Probation Officers correctly calculated the loss attributable to the defendant as being in excess of

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[1] The PSR (¶63) declined to take these extrinsic factors into account and simply attributed to Petitioner all losses sustained by those who "purchased and sold shares of Hamilton Bancorp common stock between October 21, 1998 [when Petitioner failed to disclose the losses realized from the sale of the Russian loans in the prior month] and January 2001 [one month after the improper accounting treatment was announced and the company's books were restated]."

$20 million." *Id.* at 22. In the latter connection, the district court held that the loss causation principles in *Dura* do not apply to the calculation of loss in criminal cases. *Id.* at 24. And in making these findings, the district court expressly rejected Petitioner's request that a higher standard of proof be applied: "Well, the standard that I'm applying is a preponderance of the evidence." *Id.* at 25.

C. The Court of Appeals' Decision

The court of appeals affirmed (App. 1a-11a). With respect to Petitioner's sentencing challenges, the court held first that the preponderance standard was appropriate. App. 8a-9a. Turning to the use of the 2001 Guidelines, the court acknowledged that "if a more lenient guidelines sentence was in effect at the time of the offense, the Guidelines Manual applicable at the time of the offense must be applied to avoid an Ex Post Facto Clause violation." *Id.* at 8a. The court concluded, however, that the preponderance of the evidence justified the use of the harsher book:

> Because Masferrer's co-conspirators obstructed the SEC in 2002 in furtherance of the conspiracy, the district court correctly applied the 2001 version of the Sentencing Guidelines Manual.

Id. at 9a.

The court of appeals next sustained the $20 million loss determination. With respect to the bank's putative losses, the court noted that "Masferrer may not have caused the Russian assets to decline in value, but his criminal activity did cause them to be

sold when they were in fact worthless, and consequently, caused the $22 million loss to be realized by the bank." App. 11a. The court likewise concluded that the district court had "reasonably estimated the loss to investors due to Masferrer's conduct." *Id.* at 10a. And in sustaining the loss calculations, the court of appeals agreed with the district court that *Dura* loss causation principles do not apply to criminal sentencing: "When calculating loss to victims according to the sentencing guidelines, the district court need only make a reasonable estimate of the loss." *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents two important and recurring questions on which the circuits are deeply divided. The first involves the standard of proof that controls the determination of facts that have a powerful effect on the ultimate sentence. As this Court has repeatedly recognized, "due process and associated jury protections extend, to some degree, to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." *Apprendi* v. *New Jersey*, 530 U.S. 466, 484 (2000) (internal quotation marks and citations omitted). Although the Court by a 5-4 vote in *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), rejected a due process challenge to application of a preponderance standard to particular sentencing factors, the majority was careful to note that the findings at issue were not "a tail which wags the dog." *Id.* at 88. In the years since *McMillan*, numerous appeals courts have concluded that when the tail *is* wagging the dog – that is, for factual findings that have a disproportionate impact on sentencing – the Due

Process Clause mandates a heightened standard of proof. Even in the wake of *Booker*, the circuits remain deeply divided on this issue.

This case also presents the question whether the loss causation principles articulated in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005), apply in criminal sentencing. At least three circuits have held that they do; the court below, joined by the en banc Eighth Circuit, reached the opposite conclusion. This issue, too, is both important and recurring: The assessment of loss is a staple of contemporary white collar criminal prosecutions, and it almost invariably has dramatic consequences for the ultimate sentence.

This Court should grant review on both questions. Apart from bringing needed clarity to two central features of sentencing practice, this Court's review can also correct the manifestly erroneous disposition reached by the courts below. Factual determinations that may add decades to a defendant's sentence should not be left to the vagaries of a preponderance standard. And with respect to the calculation of loss, it is hard to see how evidence of putative loss that would not survive a motion to dismiss in *civil* litigation under *Dura* could nevertheless double or treble a defendant's sentence in *criminal* litigation. Petitioner's case is an appropriate vehicle for resolving these important questions. On the basis of the faintest whiff of evidence, Petitioner's sentence for an unexceptional securities fraud was increased by some 17½ years (at a minimum) to 30 years in prison. If that draconian result is to be imposed, it should not be based on a mere preponderance of the evidence, nor on the kind

of loss causation "evidence" that would be laughed out of court in a civil case.

I. The Decision Below Deepens A Circuit Conflict Regarding The Standard Of Proof For Factual Findings That Have A Disproportionate Impact On Sentencing.

As this Court held in *In re Winship*, 397 U.S. 358, 364 (1970), "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." A heightened standard of proof, the Court explained, recognizes that "[t]he accused during a criminal prosecution has at stake interest of immense importance. . . ." *Id.* at 363. The first question presented is whether the due process safeguards of a heightened standard of proof should apply not only to conviction but to sentencing determinations, at least where the fact at issue would make a dramatic difference in the ultimate sentence.[2] At least two circuits courts have held that a heightened standard of proof is required under such circumstances, while the court below and three other circuits have held otherwise.

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[2] See *Cunningham* v. *California*, 549 U.S. 270, 127 S. Ct. 856, 863-64 (2007) ("This Court has repeatedly held that . . . any fact that exposes a defendant to a greater potential sentence must be . . . established beyond a reasonable doubt, not merely by a preponderance of the evidence."); *United States* v. *Booker*, 543 U.S. 220, 231 (2005) ("'If a State makes an increase in the defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'") (quoting *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002)).

1. *The Pre-Booker Case Law.* In *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), the Court rejected a due process challenge to a Pennsylvania provision that imposed a mandatory minimum sentence if, after conviction, a judge found by a preponderance of evidence that the convicted felon had engaged in visible possession of a firearm during the offense. The Court emphasized that the Pennsylvania statute "gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id.* at 88. In the wake of *McMillan*, several courts of appeals concluded that, when the tail *is* wagging the dog, a heightened standard of proof must be applied.

The leading case was *United States* v. *Kikumura*, 918 F.2d 1084 (3d Cir. 1990). Kikumura was convicted of offenses carrying a Guidelines range of 27 to 33 months, but the district court found facts resulting in an upward departure to 360 months imprisonment. Reversing, the Third Circuit noted that, although less procedural protection is necessary for "more mundane, familiar sentencing determinations" (*id.* at 1100-01), such "truncated procedures" are not appropriate where a sentencing enhancement represents the overwhelming proportion of the punishment imposed. Because Kikumura's sentence was significantly longer than that ordinarily prescribed by the Guidelines, the Third Circuit required a heightened standard of proof.

The rule in *Kikumura* was thereafter adopted by at least five other circuits. See, *e.g.*, *United States* v. *Mezas de Jesus*, 217 F.3d 638, 642-45 (9th Cir. 2000) (requiring facts supporting nine-level Guidelines enhancement to be found by clear and convincing

evidence); *United States* v. *Gigante*, 94 F.3d 53, 56 (2d Cir. 1996) ("In our view, the preponderance standard is no more than a *threshold* basis for adjustments and departures, and the weight of the evidence, at some point along a continuum of sentence severity, should be considered with regard to both upward adjustments and upward departures") (emphasis in original); *United States* v. *Trujillo*, 959 F.2d 1377, 1382 (7th Cir. 1992) (adopting *Kikumura*); *United States* v. *Townley*, 929 F.2d 365, 369-70 (8th Cir. 1991) (noting that "in an exceptional case, such as this one, the clear and convincing standard adopted by [*Kikumura*] might apply"); *United States* v. *St. Julian*, 922 F.2d 563, 569 n.1 (10th Cir. 1990) (adopting *Kikumura*). As this Court observed in *United States* v. *Watts*, 519 U.S. 148 (1997):

> We acknowledge a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence. The cases before us today do not present such exceptional circumstances, and we therefore do not address that issue.

Id. at 156-57. See also *id.* at 156 n.2 (identifying seven opinions of courts of appeals supporting a higher standard of proof than preponderance of evidence, as well as a dissent by Justice White from a denial of certiorari on a similar issue in *Kinder* v. *United States*, 504 U.S. 946, 948-49 (1992)).

2. *Developments Since Booker.* In the wake of *United States* v. *Booker*, 543 U.S. 220 (2005), the

battle lines have shifted, but the circuits remain deeply divided on the appropriate standard of proof. In *United States* v. *Fisher*, 502 F.3d 293 (3d Cir. 2007), the Third Circuit switched sides, holding that *Kikumura* is no longer good law and that facts with a disproportionate impact on sentencing need be proved only by a preponderance of the evidence.

The Seventh Circuit has since joined the Third Circuit. In *United States* v. *Reuter*, 463 F.3d 792 (7th Cir. 2006), that court noted that it had "occasionally indicated sympathy for [the *Kikumura*] position." *Id.* at 793. The Seventh Circuit concluded, however, that "[t]he debate has, we believe, been rendered academic by *United States* v. *Booker*." *Ibid.* Under *Booker*, the court reasoned, district judges have discretion to apply the statutory sentencing factors of 18 U.S.C. § 3553(a), and it is therefore permissible for the court to find sentencing facts by a "mere" preponderance of the evidence. *Ibid.*

More recently, the Sixth Circuit reached the same conclusion. *United States* v. *Brika*, 487 F.3d 450, 460-62 (6th Cir. 2007). According to the Sixth Circuit, challenges to "large enhancements . . . should be viewed through the lens of *Booker* reasonableness rather than that of due process." *Id.* at 462 (citation omitted).

In contrast, the Ninth and Eighth Circuits have consistently held, post-*Booker*, that sentencing facts with a disproportionate impact must be established by clear and convincing evidence.[3] As these circuits

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[3] The Tenth Circuit recently recognized the circuit conflict regarding whether due process requires a heightened standard for sentencing facts with disproportionate impact but found no

have noted, although the Guidelines no longer control the ultimate sentence, they remain a required first step and must therefore be accurately assessed. "[B]ecause facts found by the district court may still have an *actual* disproportionate impact on the sentence ultimately imposed, the due process concerns which animated our adoption of the clear and convincing standard in such limited instances have not evaporated." *United States* v. *Staten*, 466 F.3d 708, 720 (9th Cir. 2006) (emphasis in original). Thus, the Ninth Circuit has concluded "that the clear and convincing standard still pertains post-*Booker* for an enhancement applied by the district court that has an extremely disproportionate effect on the sentence imposed." *Id.* at 718. See also *United States* v. *Lynch*, 437 F.3d 902, 916 (9th Cir. 2006) (en banc) (noting post-*Booker* that "when a sentencing factor has an extremely disproportionate effect on the sentence relative to the conviction, the government must prove such a factor by clear and convincing evidence.").

The Eighth Circuit has also held that, *Booker* notwithstanding, some sentencing facts must be subject to a heightened standard of proof. See *United States* v. *Archuleta*, 412 F.3d 1003, 1007 (8th Cir. 2005).[4] In *Archuleta*, the court of appeals, citing *McMillan*, 477 U.S. at 88, explained that it had

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need to take sides in the case then before it. See *United States* v. *Olsen*, 519 F.3d 1096, 1004-06 (10th Cir. 2008).

[4] See also *United States* v. *Okai*, 454 F.3d 848, 852 (8th Cir. 2006) ("[W]e have recognized that due process may require sentencing courts to apply a higher standard of proof in situations where the sentencing enhancement becomes the 'tail which wags the dog of the substantive offense,'" citing *United States* v. *Townley*, 929 F.2d 365, 369 (8th Cir. 1991) (quoting *McMillan*)).

applied the *McMillan* tail-wagging-the-dog principle in the past, and that "[n]othing in *Booker* changes the interpretation of *McMillan* in our post-*Apprendi* cases." *Ibid.* The court therefore "review[ed] Archuleta's *McMillan* challenge to determine whether judge-found facts increased his sentence within the statutory range to such a degree as to have violated his right to due process." *Ibid.* (finding that an increase of, at most, 27 months "is not such an increase that we would say the enhancements were the tail that wagged the substantive offense").[5] *Id.* at 1008.

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[5] A number of district courts also have held since *Booker* that factual findings at sentencing must be made under a heightened standard of proof. See, *e.g.*, *United States* v. *Pimental*, 367 F. Supp. 2d 143, 153 (D. Mass. 2005) ("Certain facts like the amount of loss continue to assume inordinate importance in the sentencing outcome. So long as they do, they should be tested by our highest standard of proof."); *United States* v. *Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1027 (D. Neb. 2005) ("In order to comply with due process in determining a reasonable sentence, this court will require that a defendant is afforded procedural protections under the Fifth and Sixth Amendments in connection with any facts on which the government seeks to rely to increase a defendant's sentence."); *United States* v. *Gray*, 362 F. Supp. 2d 714, 723-24, 724 n.3 (S.D. W. Va. 2005) (a beyond-a-reasonable-doubt standard recognizes that a "tail-wagging-the-dog danger remains present under the advisory Guidelines."); *United States v. Coleman*, 370 F. Supp. 2d 661, 668 (S.D. Ohio 2005) (applying beyond a reasonable doubt standard to acquitted conduct and preponderance standard to all other sentencing facts); *United States* v. *Kandirakis*, 441 F. Supp. 2d 282, 329 (D. Mass. 2006) (requiring drug quantity enhancements to be presented to jury for advisory verdict because "[t]he Fifth Amendment and its *current* Supreme Court interpretation require proof beyond a reasonable doubt") (emphasis in original).

3. *The Present Case.* This case presents a disturbing illustration of what can go wrong when highly consequential sentencing determinations are left to the vagaries of the preponderance standard. Two critical facts – how long Petitioner's criminal conduct continued and what the amount of the loss was – were determined only by a preponderance of the evidence. As a result, Petitioner's sentence was at least doubled and likely more than trebled in length.[6]

A heightened standard of proof would have never permitted the stunning casualness with which these two crucial findings were made. The evidence that Petitioner's conduct continued after November 2001 was exceedingly thin:

- Only two paragraphs of the 54-page Second Superseding Indictment dealt with any conduct after November 2001, and neither involved Petitioner. These two paragraphs alleged that Jacobs and Bernace gave false testimony to the SEC in Spring 2002. Yet the jury never was required to make any finding regarding this allegedly false SEC testimony in 2002, let alone Petitioner's involvement in supposedly procuring it.

- The substantive count in the Indictment discussing the 2002 SEC testimony was withdrawn (Count 20). The remaining

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[6] Indeed, the government admitted at sentencing that, if the 1998 or 2000 Sentencing Manuals had been used, Petitioner's minimum sentence under the Guidelines would have dropped from 360 months to 151 months. See United States' Response to Defendant's July 19, 2008 Objections, filed July 25, 2006, at 3 n.1 & Exh. C.

substantive offenses (Counts 2-13, 16-18) all were alleged to have occurred before December 2000.

- The evidence at trial established that the last offense of conviction and conspiratorial act allegedly committed by Petitioner occurred on November 30, 2000, when Petitioner testified before the OCC (Count 18).

- The jury found in its special verdict form that the objects of Petitioner's conspiracy count included "making false statements to the United States" and "obstruction of proceedings before a federal agency," but this finding was entirely consistent with the jury's verdict on substantive Count 18 that Petitioner had given false testimony *to the OCC*. Indeed, none of the objects of the conspiracy, as instructed to the jury, involved any conduct after November 30, 2000.[7]

The courts below concluded, however, that Petitioner conspired with Jacobs and Bernace to obstruct the SEC investigation in 2002. To say that the evidence on this crucial point was tissue thin gives the government more than it is due. Indeed, the only evidence identified by the Government was that Petitioner had discussed with Jacobs and Bernace,

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[7] The Eleventh Circuit relied on the proposition that "the jury returned a special verdict finding Masferrer guilty of conspiracy to make false statements to the SEC (object 'h' in the indictment)." App. 9a. If that were true, it would obviously be fatal to Petitioner's position. But it is quite false, as even a cursory glance at the actual verdict form and jury instructions reveals. See Verdict Form, filed May 10, 2006; and May 9, 2006 Tr. 182-83, 188, 208-09.

some two years earlier, that the three of them should maintain "a common front" with the OCC; but that is a far cry from an agreement to obstruct the SEC, a different agency, some two years later. Indeed, the SEC investigation had not even begun at the time Petitioner ostensibly urged his confederates to obstruct that agency. And when the SEC investigation was actually launched, Petitioner had no conversations with Jacobs and Bernace, and he took the quite different approach of asserting his Fifth Amendment rights rather than testifying. Moreover, by the time of the SEC inquiry, Hamilton Bank had publicly acknowledged that its accounting and SEC filings were inaccurate and had restated its earnings. Thus, by the time of Jacobs's and Bernace's 2002 SEC testimony, the conspiracy was long since over, and the transactions in question had been fully disclosed to the public. As this Court has cautioned, a defendant cannot be held liable for acts of putative concealment undertaken after the objectives of the conspiracy have been attained. See *Grunewald* v. *United States*, 353 U.S. 391 (1957).

It is hard to see how the Jacobs/Bernace testimony surmounted even a preponderance standard. But it never could have passed muster under a heightened standard of proof. Petitioner now sits in jail for at least 17 extra years because the courts below subjected the government's sentencing proof to the lowest standard of proof there is.[8]

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[8] Applying the Ninth Circuit's higher standard under precisely these circumstances, the court in *United States* v. *Jensen*, 537 F. Supp. 2d 1069, 1079 (N.D. Cal. 2008), declined to adopt a later and harsher set of Guidelines, concluding that "the government has not established by clear and convincing evidence that the

The lower courts' loss calculation was also marred by the minimal standard of proof. Indeed, as we explain in connection with the second question presented, the court of appeals' loss analysis was impaired not only by the standard of proof but also by the court's refusal to apply the loss causation principles of *Dura*. But the use of a preponderance standard greatly compounded the error. With respect to the bank's alleged losses, the lower courts' analysis is especially unpersuasive. There, the prosecution's theory was that Petitioner had engaged in illegal conduct to hide the $20 million in losses that already existed in the bank's Russian portfolio. These Russian bond losses predated, and were the very motivation for, the swap transaction involving the Latin assets. Thus, Petitioner's improper activities relating to the swap transaction did not cause (indeed, they could not have caused) the $20 million loss. To be sure, as the court of appeals noted, the swap transaction resulted in a *recognition* of the losses on the books of Hamilton Bank in 1998. But it simply does not follow that Petitioner's conduct *caused* a more than $20 million loss. It was the decline in value of the Russian bonds, and not Petitioner's actions to hide that decline, that caused the bank's $20 million loss.

A preponderance standard of proof invites this kind of imprecise analysis. And as with the choice of the 2001 Manual, the loss determination was devastating, adding 22 offense levels under the 2001 Manual. If the government had been required to

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conspiracy existed beyond November of 2003, . . . [so] it would violate the ex post facto clause to subject [the defendant] to [the newer Manual]."

prove loss by clear and convincing evidence as required by the Eighth and Ninth Circuits, or beyond a reasonable doubt as required by a number of district courts, the lower courts would almost certainly have found a vastly smaller amount of loss, indeed, likely none at all. The difference would have been a Sentencing Guidelines range of, at most, 188-235 months, even under the (inapplicable) 2001 Manual.[9]

II. The Decision Below Deepens A Circuit Conflict Regarding Whether The Loss Causation Principles Articulated In *Dura* Apply In Criminal Sentencing.

Petitioner's sentence also was based on a calculation of loss that was erroneous and depended on choosing the pro-government side of a circuit split. In determining loss, the district court declined to apply the principles of loss causation articulated by this Court in *Dura*. The Eleventh Circuit affirmed the lower court's calculation of loss, joining the Eighth Circuit in concluding that district courts need not apply *Dura* to "make a reasonable estimate of loss." The decision below deepens a conflict with the Second, Fifth, and Ninth Circuits, all of which have concluded that the loss causation principles of *Dura* should be applied in criminal sentencing.

1. In *Dura*, this Court unanimously held that a shareholder who purchases stock at a value inflated

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[9] Significantly, under the 1998 Manual – which should have been used – the Guidelines range would likely have been roughly the same as the range for Bernace, who was sentenced under the 1998 Manual to 78-97 months (before any reduction for testifying against Petitioner).

by fraud has not yet suffered an economic loss. "For one thing," the Court explained, "as a matter of pure logic, at the moment the transaction takes place, the [shareholder] has suffered no loss; the inflated purchase payment is offset by ownership of a share that *at that instant* possesses equivalent value." 544 U.S. at 342 (emphasis in original). If "the purchaser sells the shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any loss." *Ibid.* And even if the purchaser holds his shares until *after* the underlying fraud is disclosed to the market, the lower sale price "may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price." *Id.* at 342-43. In short, the Court in *Dura* held that a stock purchaser sustains a loss *only* if, having bought the stock at a price inflated by fraud, he sells the stock at a lower price caused by disclosure of the fraud. *Id.* at 347.

2. Several circuits have applied *Dura* to calculate loss in criminal sentencing, rejecting the argument, adopted by the Eleventh Circuit here, that *Dura*'s loss causation principles do not apply in the criminal sentencing context. The Second Circuit left no doubt about its position:

> The Government contends that the principles set forth in *Dura Pharmaceuticals*, a civil case, should not apply to loss calculation in a criminal case. . . . [W]e see no reason why considerations relevant to loss causation in a civil fraud case should

> not apply, at least as strongly, to a sentencing regime in which the amount of loss caused by a fraud is a critical determinant of the length of a defendant's sentence.

United States v. *Rutkoske*, 506 F.3d 170, 179 (2d Cir. 2007); see also *United States* v. *Leonard*, 529 F.3d 83, 93 n.11 (2d Cir. 2008) ("As we explained in *Rutkoske*, the district court may look to principles governing recovery of damages in civil securities fraud cases for guidance in calculating the loss amount for purposes of the Guidelines").

The Fifth Circuit also has clearly held that the loss causation principles in *Dura* should apply in the criminal context. In overturning a 24-year sentence, that circuit stated:

> The civil damage measure should be the backdrop for criminal responsibility both because it furnishes the standard of compensable injury for securities fraud victims and because it is attuned to stock market complexities. In civil cases, the principle of loss causation is well established. See *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 125 S. Ct. 1627, 1631-32, 161 L.Ed.2d 577 (2005). . . . Thus, there is no loss attributable to a misrepresentation unless and until the truth is subsequently revealed and the price of the stock accordingly declines. Where the value of a security declines for other reasons, however, such decline, or component of the decline, is

> not a "loss" attributable to the misrepresentation.

United States v. *Olis*, 429 F.3d 540, 546 (5th Cir. 2005).

The Ninth Circuit has also applied the loss causation principles of *Dura* to criminal sentences. As the court explained in *United States* v. *Zolp*, 479 F.3d 715, 719 (9th Cir. 2007), "[i]n making a loss calculation [under the Guidelines], . . . the court must disentangle the underlying value of the stock, inflation of that value due to the fraud, and either inflation or deflation of that value due to unrelated causes. Cf. *Dura*."[10]

By contrast the Eighth Circuit en banc has taken the same position as the Eleventh Circuit in this case, declining to apply *Dura* to a criminal sentencing. *United States* v. *Mooney*, 425 F.3d 1093, 1100 n.6 (8th Cir. 2005). Over a vigorous dissent by Judge Bright speaking for himself and two other judges, the majority held that "[c]riminal prosecutions for violations of securities law are different, however, for 'the victims and their losses are difficult if not impossible to identify' as the guideline commentary points out." *Ibid.*[11]

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[10] The Ninth Circuit in *Zolp* also applied the clear and convincing evidence standard in rejecting as insufficient the government's proof of loss.

[11] Judge Bright explained in dissent that, "[t]he terms gain and loss are ordinary words with meanings that are similar whether they are used in a civil or a criminal context. If those gains are not a causative factor in a civil fraud or deception case, that obvious concept should not apply in the criminal case, where the stakes for a defendant relate not to money but to freedom from

3. The present case illustrates the consequences of declining to apply *Dura* in criminal sentencing. The district court, affirmed by the court of appeals, based its shareholder loss calculation on *all* losses sustained by *all* shareholders who purchased and sold shares of Hamilton Bank between October 21, 1998 (when Petitioner should have disclosed the losses from the sale of the Russian loans) and January 2001 (one month following the bank's restatement). Thus, any loss sustained by an investor who sold *anytime* during this period was attributed to Petitioner's illegal conduct. According to the Eleventh Circuit, this was "reasonable":

> The district court carefully limited the victim group to those investors who had purchased Hamilton Bank stock after Masferrer made fraudulent misrepresentations about the bank's 1998 earnings. By limiting the victim group in this way, the district court reasonably estimated the loss to investors due to Masferrer's conduct.

App. 10a.

Yet, this was the very approach to investor loss shown in *Dura* to fail "as a matter of pure logic." 544 U.S. at 342. As the Court noted in *Dura*, an inflated purchase price will not itself constitute or proximately cause any economic loss; "the inflated purchase payment is offset by ownership of a share that *at that instant* possesses equivalent value." *Ibid.*

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incarceration. The majority opinion rejects the application of the civil cases of *MacDonald* and *Dura* to the present criminal case – yet, cites no caselaw, civil or criminal, to support its theory of sentencing." *Mooney*, 425 F.3d at 1108 (Bright, J., dissenting).

(emphasis in original). The mere fact that the victim group was limited to those Hamilton Bank shareholders who purchased after the fraudulent misrepresentations is plainly insufficient – those individuals suffered a loss only if they sold at a lower price that was caused by a disclosure of the alleged fraud. By contrast, those Hamilton Bank investors who sold *prior to* the public disclosure of the improper accounting transactions suffered no loss that is attributable to Petitioner's conduct. As the *Dura* Court explained, "if, say, the purchaser sells the shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any loss." *Ibid.* The trial court, affirmed by the Eleventh Circuit, erred in not applying *Dura* to exclude from the loss calculations those individuals who bought inflated stock but sold an equally inflated stock, thereby suffering no loss caused by Petitioner's fraud.[12]

But the lower courts' analysis is flawed even beyond that. As *Dura* also teaches, 544 U.S. at 342-43, stock prices are subject to market forces that have nothing to do with the putative fraud. Indeed, in this case the government's own expert acknowledged that there was a general decline in *all* bank stocks between 1998 and 2001. May 4, 2006 Tr. (pm) 29-30. *Dura* instructs courts and juries in civil cases to take account of such extrinsic factors in determining shareholder loss. The lower courts in this case emphatically refused to do so.

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[12] See, *e.g.*, *United States* v. *Olis*, 429 F.3d at 546 ("Thus, there is no loss attributable to a misrepresentation unless and until the truth is subsequently revealed and the price of the stock accordingly declines.").

The numbers tell the story. On October 21, 1998, Hamilton Bank stock was selling at approximately $30 per share. By December 25, 2000 – the day *before* the restatement (and thus *before* Petitioner's alleged fraud was disclosed to the market) – the price of Hamilton Bank stock had dropped to $6 per share. Sept. 8, 2006 Tr. 11-12. Yet the lower courts' loss calculation attributed to Petitioner all losses incurred by anyone who sold in this time period *before disclosure of the fraud*. Petitioner could not have caused any of those losses.

Indeed, when Hamilton Bank announced the restatement on December 26, 2000, the price of Hamilton Bank stock went *up* that day and the next. The rise in the bank stock convincingly refutes the government's claim that Petitioner's conduct caused any investor loss, much less the gargantuan amount calculated by the district court. There is no basis in these circumstances – where the stock actually goes up when the alleged fraud is disclosed – to conclude that Petitioner's fraud involving a small fraction of the Company's assets had any impact on the price of the stock or caused any losses.

The Eleventh Circuit's failure to apply *Dura* principles of loss causation had its most obvious impact on the calculation of *shareholder* loss. But the court's refusal to consider *Dura* likewise impaired its assessment of loss to the bank. As this Court explained in *Dura*, 544 U.S. at 343, 344-45, loss causation is a specific application of the more general principle of *proximate cause*. Proximate cause recognizes that defendants may sometimes be the "but for" cause of an injury and yet not the legally responsible cause. In the case of shareholder loss, for

example, a defendant may be the "but for" cause of artificial inflation in a stock price, and thus the "but for" cause of loss to a shareholder who sells his inflated stock in a down market. But unless that shareholder has sold at a loss that was actually caused by the disclosure of the defendant's fraud, *Dura* teaches that the defendant is not the proximate cause of the loss.

Had the courts below reckoned with that basic principle, they could never have found a $20 million loss to Hamilton Bank. As the court of appeals itself acknowledged, Petitioner "may not have caused the Russian assets to decline in value. . . ." App. 9a. Indeed, the very purpose of the alleged scheme, according to the government, was to conceal a loss that had already occurred. And while Petitioner may have caused the bank "to realize" that loss (by causing the bank to account for the loss on its books), that is not legal causation in the *Dura* sense. Application of *Dura* loss causation principles would never have permitted so basic a failure of logic.

The finding of $20 million in loss added at least 14 years to Petitioner's sentence under the (inapplicable) 2001 Manual. That finding is deeply unjust. This Court should review the Eleventh Circuit's refusal to apply *Dura* principles of loss causation in criminal cases.

III. The Questions Presented Are Important And Recurring.

As evidenced by the depth of the split among the lower courts, the question of the proper standard for proving facts with a disproportionate impact on sentencing has arisen repeatedly since *McMillan*.

The frequency with which this issue presents itself is not surprising given the paramount importance certain factual findings, such as drug quantity or possession of a weapon, can play in increasing sentences under the Guidelines. The large number of cases demonstrates that the appropriate standard of proof is of immediate and continuing concern to the lower courts.

Indeed, this Court has expressly noted the "divergence of opinion among the Circuits" on this issue. *United States* v. *Watts*, 519 U.S. at 156. And in dissenting from a denial of certiorari, Justice White explained that a circuit conflict on "the burden of proof at the sentencing hearing . . . reflect[s] important and recurring problems." *Kinder* v. *United States*, 504 U.S. 946, 946 (1992. Justice White highlighted the significance of the issue for the criminal justice system:

> The burden of proof at sentencing proceedings is an issue of daily importance to the district courts, with implications for all sentencing findings, whether they be the base offense level, specific offense characteristics, or any adjustments thereto, or even to those facts found to warrant departure altogether. The resolution of disputed matters at sentencing obviously has serious implications for both the defendant and the Government, as it controls the length of sentence actually to be imposed. I would grant certiorari to clarify the applicable standards.

Id at 949.

The loss causation question is also surpassingly important. The issue applies to virtually every criminal securities fraud case. As a result, there has been a regular flow of cases raising the loss causation issue since *Dura*, and this will continue. Furthermore, whether to apply *Dura* principles has an enormous impact on the sentence actually imposed in each of these criminal cases. Thus, James Olis was originally sentenced to 24 years for securities fraud based on the kind of "general" principles adopted by the Eleventh Circuit in the present case. After the Fifth Circuit mandated application of the loss causation principles of *Dura*, see *United States* v. *Olis*, 429 F.3d 540 (5th Cir. 2006), the amount of the loss was recalculated, and Olis was resentenced to 6 years imprisonment. Petitioner is entitled to the same rule of law that shaved 18 years off of Olis's sentence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2008

APPENDIX

APPENDIX A

[PUBLISHED]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

(File Stamp Omitted)

No. 06-14223

D.C. Docket No. 04-20404-CR-KMM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDUARDO A. MASFERRER,

Defendant-Appellant.

Appeal from the United States District Court

for the Southern District of Florida

(January 22, 2008)

Before DUBINA and KRAVITCH, Circuit Judges, and GOLDBERG,* Judge.

GOLDBERG, Judge:

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* Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

Eduardo A. Masferrer appeals his conviction and sentence for numerous counts relating to bank and securities fraud. Masferrer argues that his case was improperly assigned to Judge K. Michael Moore, and he is therefore entitled to a new trial before a randomly selected judge. He also appeals several evidentiary rulings and his thirty-year sentence.

I. BACKGROUND

Masferrer was the Chairman and CEO of Hamilton Bank and its holding company, Hamilton Bancorp (collectively, "Hamilton Bank"). Beginning in 1997, the bank invested in approximately $22 million worth of Russian debt instruments ("Russian assets"), which dramatically lost value during the summer of 1998. In order to conceal this loss, Masferrer and his co-conspirators allegedly devised a scheme that would enable Hamilton Bank to liquidate its Russian assets at full face value through "ratio swaps." Ratio swaps are exchanges of assets in which the prices of the swapped items are deemed to be at face value, with the difference between the face and fair market value of the seller's asset offset by a similar disparity in the asset received in return. Ratio swaps are not per se fraudulent, but accounting rules require that the exchanges be recorded as related transactions and any loss must be recognized immediately. Masferrer swapped the Russian assets in exchange for other debt instruments, but knowingly refused to record the swaps as related transactions. As a result, it appeared that Hamilton Bank managed to sell its Russian assets at face value, thereby hiding their highly discounted sales prices. The ratio swaps turned out to be financially disastrous for Hamilton Bank. The failure to properly account for the swaps caused Masferrer and his

co-conspirators to make material misrepresentations to the bank's internal and independent auditors, federal regulators, and the investing public. Masferrer was found guilty of all 18 counts of the indictment and was sentenced to thirty years imprisonment.

II. DISCUSSION

A. Case Assignment

Masferrer claims that he is entitled to a new trial because Judge Lawrence King, after filing an order of recusal, transferred his case to Judge K. Michael Moore. Even if we assume, arguendo, that Judge King's actions technically violated the local rules governing case assignments or the recusal statute, 28 U.S.C. § 455, vacatur is only an available remedy when the defendant can point to particular circumstances that prove that "the potential bias on the part of the judge represented a risk of injustice to it." United States v. Cerceda, 172 F.3d 806, 813 (11th Cir. 1999) (en banc) (per curiam); see also Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 864, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988) (holding that a judicial action taken in violation of recusal statute should be remedied by vacatur only after the court considers the risk of injustice to the parties, the risk that denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process). Masferrer has not pointed to any particular circumstances indicating that there was any potential bias on the part of Judge Moore that represented a risk of injustice to any party, and therefore a new trial is not warranted.

B. Excluded Evidence

Masferrer claims that the district court violated his Fifth and Sixth Amendment rights when it excluded evidence (1) showing that three of the Russian loans involved in the "swap" transactions were paid off in full within one year of their sale, and (2) showing that after the new debt instruments were received in exchange for the Russian assets, the bank's loan officers deemed them creditworthy. Masferrer claims this evidence shows that it was reasonable for him to believe that both the Russian loans (sold by Hamilton bank) and the new debt instruments (purchased by Hamilton bank) were worth their full face value at the time of the swap. According to Masferrer's theory, if he reasonably could have believed that the loans were worth their full face value at the time of their sale and purchase, he did not intend to engage in an illegal "swap" to defraud the government.

Masferrer's argument fails because "where the proffered evidence does not bear a logical relationship to an element of the offense or an affirmative defense ... a defendant has no right to introduce that evidence and a district court may properly exclude it." United States v. Hurn, 368 F.3d 1359, 1365 (11th Cir. 2004). The only evidence relevant to Masferrer's intent is what he believed at the time of the transactions. See id. at 1366 (holding that proffered evidence could only tend to negate mens rea if defendant knew about it at the time she made false statements). The fact that the Russian loans were ultimately paid off is not relevant to the question of whether Masferrer intended to defraud the government and investors at the time of the questionable transactions. Likewise, the fact that the new debt instruments were found to be creditworthy

after their purchase does not tend to prove that Masferrer believed they were worth face value at the time of their purchase. Masferrer was free to present evidence concerning his belief about the value of the loans, as long as it reflected what he believed during the relevant time period. The district court did not violate Masferrer's constitutional rights when it excluded evidence of the value or creditworthiness of the loans after the swap transaction took place.

C. Government Evidence Relating to the Value of Acquired Assets

Masferrer argues that the district court abused its discretion in admitting, over his hearsay objection, (1) historical financial data provided by the Bloomberg Financial Service and (2) testimony concerning the market values assigned to the Russian assets and new debt instruments by Standard Bank and West Merchant Bank on their trading books at the time of the swap. "A district court's ruling on the admissibility of evidence is reviewed for abuse of discretion." United States v. Schlei, 122 F.3d 944, 980 (11th Cir. 1997) (internal quotations omitted).

(i) Bloomberg Evidence

In order to calculate the bank's losses from the ratio swaps, OCC regulators and Hamilton Bank's accounting personnel reconstructed the trades and determined the market values for the acquired assets at the time of the swaps. The bank's accountants calculated an unreported $22 million loss. This figure was derived from computerized records of the Bloomberg Financial Service. At trial, a Bloomberg executive explained that Bloomberg collects market price quotes for all types of markets, including debt

securities markets. The actual Bloomberg price quotes used by the accountants and regulators contained were also admitted. On appeal, Masferrer argues that the Bloomberg quotes and related testimony should have been excluded because they constitute inadmissible hearsay and improper "expert" opinion pursuant to Daubert v. Merrell Dow Pharms., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and Federal Rule of Evidence 702.

The Bloomberg market quotes are admissible pursuant to Federal Rule of Evidence 803(17), which provides a hearsay exception for "[m]arket reports, commercial publications[-]Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." FED. R. EVID. 803(17). The government presented evidence at trial establishing that Bloomberg financial information is universally relied upon by individuals and institutions involved in financial markets. The fact that the Bloomberg information was used to price an illiquid asset does not bring it outside the scope of 803(17). Therefore, the district court did not err by allowing the government to introduce the Bloomberg data. Additionally, the Bloomberg executive's testimony does not implicate Daubert or Rule 702, because it is not expert opinion testimony. Instead, it only provided the necessary context for the admissible market quotations.

(ii) Evidence of market values of the Russian loans and new debt instruments from West Merchant and Standard Bank

Peter Kennedy testified that he agreed, on behalf of his employer, Standard Bank, to engage in a ratio swap involving one of the Russian loans. According to the

terms of this swap, Standard bank would purchase the $7.5 million Russian loan, at face value, in exchange for Hamilton Bank's reciprocal purchase, at face value, of debt instruments selected by Masferrer. Standard Bank did not own those debt instruments at the time, and had to purchase most of them from the secondary market in order to complete the swap. Kennedy did not execute the purchases of these instruments and could not independently recall their individual prices. However, the prices were contemporaneously recorded on an internal bank memorandum which was authenticated and received into evidence as a business record. Kennedy did recollect that the instruments selected by Masferrer were obtained in the secondary market at between 50 and 88% of face value.

Masferrer argues that Kennedy's testimony was inadmissible hearsay because he had no personal knowledge of the purchase prices. However, the purpose of Kennedy's testimony was not to establish purchase price. Instead, the memorandum containing the prices was received into evidence as a business record. The purpose of Kennedy's testimony was to demonstrate that Masferrer knew that the swapped assets were not worth their face value.[1] According to Kennedy, Masferrer knew that Standard Bank would have to acquire the new debt instruments on the open market below face value. Whether or not Kennedy knew the specific price at which the assets were purchased by Standard Bank was not particularly relevant to his

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[1] Kennedy did have personal knowledge of the fact that the purchase prices of the Latin assets were at 50-88% of their face value.

testimony.[2] As such, the district court did not commit error when it admitted this evidence.

D. Sentencing Guidelines Manual

Masferrer claims that the district court violated his rights under the Ex Post Facto Clause of the Constitution when it applied the 2001 version of the Sentencing Guidelines Manual during sentencing. The sentencing court should normally apply the guidelines in effect at the time of the sentencing. See 18 U.S.C. § 3553(a)(4)(A) (2000). However, if a more lenient guidelines sentence was in effect at the time of the offense, the Guidelines Manual applicable at the time of the offense must be applied to avoid an Ex Post Facto Clause violation. See United States v. Simmons, 368 F.3d 1335, 1338 (11th Cir. 2004). Masferrer asserts that all of his alleged criminal conduct occurred by December 2000, before the 2001 Guidelines Manual was in effect.

The sentencing court appropriately used the 2001 Guidelines Manual to sentence Masferrer. The jury found Masferrer guilty of Count 1, which alleged conspiracy to defraud the United States. Because this conspiracy was to "commit one crime in two ways," (i.e., conspiracy to defraud the United States by obstructing the OCC or SEC), the court was simply required to find by a preponderance of the evidence that

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[2] In his initial brief, Masferrer also argues that "Tweedley's similar testimony concerning how [West Merchant Bank] allegedly determined values should have been disallowed for the same reason." Appellant's Br. 53. Tweedley worked for [West Merchant Bank], which is a bank involved in a different ratio swap orchestrated by Masferrer. Tweedley's testimony is admissible for the same reasons as Kennedy's.

Masferrer conspired to obstruct the SEC in 2002. See United States v. Riley, 142 F.3d 1254, 1257 (11th Cir. 1998) (per curiam) (quoting United States v. Edwards, 105 F.3d 1179, 1181 (7th Cir. 1997)). The district court adopted the presentence report, and thereby satisfied this requirement.[3] See id. Additionally, the jury returned a special verdict finding Masferrer guilty of conspiracy to make false statements to the SEC (object "h" in the indictment). Because Masferrer's co-conspirators obstructed the SEC in 2002 in furtherance of the conspiracy, the district court correctly applied the 2001 version of the Sentencing Guidelines Manual.[4]

E. Loss Calculation

"A district court's interpretation of the sentencing guidelines is subject to de novo review, while its factual

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[3] Masferrer focuses his argument on the fact that a multi-object conspiracy was also alleged in Count 1. This is not relevant because the first part of Count 1 encompasses the relevant conduct that took place in 2002.

[4] Masferrer claims that there was no evidence that he conspired with anyone to obstruct the SEC's investigation in 2002. This argument is meritless. There was sufficient evidence presented at trial that obstruction of the SEC, perpetrated by Masferrer's co-conspirators, was part of the conspiracy to defraud the United States. In the case of a criminal conspiracy, the guidelines sentence shall be based on, inter alia, "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity ...." U.S.S.G. § 1B1.3(a)(1)(B) (2001). There was also no evidence that Masferrer withdrew from the conspiracy. See United States v. Young, 39 F.3d 1561, 1571 (11th Cir. 1994) (requiring affirmative steps to defeat the objects of the conspiracy and communication of these steps to co-conspirators).

findings are reviewed for clear error." United States v. Douglas, 489 F.3d 1117, 1129 (11th Cir. 2007) (per curiam).

The district court found, through adoption of the presentence report, that Masferrer's conduct resulted in losses of between $20 and $40 million. This figure included, inter alia, (1) losses borne by investors who purchased Hamilton Bank stock in reliance upon its misleading 1998 earnings pronouncements; and (2) the losses borne by Hamilton Bank due to the ratio swaps and by the inflated bonuses paid to the conspirators. Masferrer disputes the propriety of both of these loss calculations, and concedes only the $1 million in bonuses improperly conferred upon the conspirators.

When calculating loss to victims according to the sentencing guidelines, the district court need only make a reasonable estimate of the loss. See United States v. Snyder, 291 F.3d 1291, 1295 (11th Cir. 2002). The district court carefully limited the victim group to those investors who had purchased Hamilton Bank stock after Masferrer made fraudulent misrepresentations about the bank's 1998 earnings. By limiting the victim group in this way, the district court reasonably estimated the loss to investors due to Masferrer's conduct. See id. at 1296 (stating that limiting victim class to those who bought stock after defendant's fraudulent statements was an appropriate method of calculating loss).

In addition to investor loss, the sentencing court adopted the presentence report's calculation of a $22 million loss to Hamilton Bank. Masferrer claims that he did not cause $20 million of that loss because it already existed before the swaps took place. In other words, Masferrer asserts that if the $22 million Russian assets

were worthless at the time of the swap, then the bank would have already suffered that unrealized loss before he managed to exchange them for different assets. Instead, Masferrer claims, he should be credited for the $20 million the bank received at face value pursuant to the swap arrangement. Therefore, the bank's loss only amounts to about $2 million.

The district court found that Masferrer caused the bank to realize a $22 million loss when it was required to restate its earnings for 1998. Masferrer may not have caused the Russian assets to decline in value, but his criminal activity did cause them to be sold when they were in fact worthless, and consequently, caused the $22 million loss to be realized by the bank. Consequently, the district court's calculation of total loss between $20 and $40 million was not clearly erroneous.

III. CONCLUSION

For the reasons set forth above, Masferrer's convictions and sentence are

AFFIRMED.

APPENDIX B

United States District Court

Southern District of Florida

Miami Division

UNITED STATES OF AMERICA

v.

EDUARDO A. MASFERRER

SECOND AMENDED JUDGMENT IN A CRIMINAL CASE

(Correcting amount of Defendant's Bank-Fraud Restitution, p.6)

Case Number: 113C 1:04CR20404-001(s)(s)

USM Number: 63724-004

Counsel For Defendant: Howard M. Srebnick, Esq.

Counsel For The United States: Peter Outerbridge, AUSA

Court Reporter: Larry Herr

Date of Original Judgment: (July 27, 2006)

Amended: October 24, 2007

Reason for Second Amendment:

- ☐ Correction of Sentence on Remand (Fed. R. Crim. P. 35(a))
- ☐ Modification of Supervision Conditions (18 U.S.C. § 3563 (c) or 3583(e))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b)) 35(b))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(c))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s)to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

Best Available Copy

X Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

☐ Direct Motion to District Court Pursuant to

- ☐ 28 U.S.C. § 2255
- ☐ 18 U.S.C. § 3559(c)(7), or
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

The defendant was found guilty on Count(s) 1-13, 16-18 of the Indictment.
The defendant is adjudicated guilty of the following offense(s):

Title/Section Number	Nature of Offense	Offense Ended	Count
18:371	Conspiracy to commit offenses against the United States	May 2002	1
18:1343	Wire fraud affecting financial institution	May 2002	2
18:1343	Wire fraud affecting financial institution	May 2002	3
18:1343	Wire fraud affecting financial institution	May 2002	4
18:1344	Bank fraud	May 2002	5
18:1344	Bank fraud	May 2002	6
18:1344	Bank fraud	May 2002	7
18:1344	Bank fraud	May 2002	8
18:1344	Bank fraud	May 2002	9
18:1344	Bank fraud	May 2002	10
18:1344	Bank fraud	May 2002	11
18:1344	Bank fraud	May 2002	12

15:78j(b) and 78ff(a)	Securities fraud	May 2002	13
18:1517	Obstruction of examination of financial institution	May 2002	16
18:1001	Making a false statement	May 2002	17
18:1505	Obstruction of agency proceedings	May 2002	18

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Count(s) Number 14 and 15 are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Original Sentence: 10/24/2006

/s/ K. Michael Moore
K. MICHAEL MOORE
United States District Judge

May 14th, 2007

DEFENDANT: EDUARDO A. MASFERRER
CASE NUMBER: 113C 1:04CR20404-001(s)(s)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$1600.00	$	$31,779,914.22

In accordance with the terms of the Court's previously issued October 20, 2006 Restitution Order (DE #559), and as further set forth in this Second Amended Judgment in a Criminal Case, the defendant is ordered to pay $17,233,435.10 in total bank fraud related restitution, allocated in the amount of $16,127,414.38 to the Federal Deposit Insurance Corporation ("FDIC") as Receiver for Hamilton Bank and, upon full satisfaction of said FDIC restitution, to pay the additional subordinated restitution amount of $1,106,020.72 to Twin City Fire Insurance Company. In addition, as further specified in this Amended Judgment and in the Court's October 20, 2006 Restitution Order, the defendant shall pay securities fraud-related restitution totaling $14,546,569.12, upon a joint and several basis with co-defendants Bernace and Jacobs, to be allocated amongst the victims identified in Exhibit One of the Government's Final Revised Restitution Calculations (DE #552) in amounts specified therein

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

APPENDIX C

IN THE UNITED STATES COURT
FOR THE ELEVENTH CIRCUIT
(File Stamp Omitted)

No. 06-14223-AA

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

EDUARDO A. MASFERRER,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: DUBINA and KRAVITCH, Circuit Judges, and GOLDBERG,* Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina

UNITED STATES CIRCUIT JUDGE

*Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

No. 08-118

In the Supreme Court of the United States

EDUARDO A. MASFERRER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court plainly erred in finding facts by a preponderance of evidence in calculating petitioner's advisory Sentencing Guidelines range.

2. Whether the district court clearly erred in calculating the loss caused by petitioner's fraud under the Sentencing Guidelines.

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In the Supreme Court of the United States

No. 08-118

EDUARDO A. MASFERRER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 514 F.3d 1158. The judgment of the district court (Pet. App. 12a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2008. A petition for rehearing was denied on March 28, 2008. On June 2, 2008, Justice Thomas extended the time within which to file a petition for writ of certiorari to and including July 26, 2008, and the petition was filed on July 28, 2008 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Southern District

of Florida of one count of conspiracy, in violation of 18 U.S.C. 371; three counts of wire fraud, in violation of 18 U.S.C. 1343 and 2; eight counts of bank fraud, in violation of 18 U.S.C. 1344; and one count each of securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff(a), obstruction of examination of a financial institution, in violation of 18 U.S.C. 1517, making a false statement, in violation of 18 U.S.C. 1001, and obstruction of agency proceedings, in violation of 18 U.S.C. 1505. Pet. App. 12a-14a. He was sentenced to 360 months of imprisonment, to be followed by five years of supervised release. He also was ordered to make restitution of almost $32 million. *Id.* at 15a. The court of appeals affirmed. *Id.* at 1a-15a.

1. Petitioner was the Chairman, Chief Executive Officer, and principal shareholder of both Hamilton Bank (HB), a federally-chartered financial institution regulated by the Office of the Comptroller of Currency (OCC), and Hamilton Bancorp, a publicly-traded holding company for HB regulated by the Securities Exchange Commission (SEC). Gov't C.A. Br. 2-3. In 1997, HB invested in approximately $22 million worth of Russian debt instruments, which lost most of their value during the summer of 1998. Pet. App. 2a; see Gov't C.A. Br. 4-6.

In an effort to conceal the losses, petitioner and two co-conspirators who were fellow executives at HB, Juan Carlos Bernace and John Jacobs, devised a scheme to liquidate HB's Russian assets through "ratio swaps," wherein the Russian assets were exchanged for other assets with a similar disparity between their face value and fair market value. Pet. App. 2a; Gov't C.A. Br. 8. While the exchanges were not themselves fraudulent, petitioner and his co-conspirators recorded the sale of

the Russian assets and the purchase of new assets as separate, unrelated transactions, contrary to applicable accounting rules. Pet. App. 2a.

Petitioner's scheme resulted in HB's avoiding the recognition of the loss derived from the Russian assets. Gov't C.A. Br. 8-13. It also resulted in material misrepresentations to HB's internal and independent auditors, to federal regulators, and to the investing public. *Id.* at 20-22. Those misrepresentations, in turn, sustained an artificially inflated share price for HB. *Id.* at 22. Petitioner personally benefitted from that artificial inflation because his bonus was tied to the bank's earnings and the market price of its common stock. *Ibid.*

Subsequently in 1999, federal regulators began investigating HB and its sale of the Russian loans. Gov't C.A. Br. 23. Petitioner and co-conspirators agreed to misrepresent that the asset exchanges were unrelated. *Ibid.* In September and November 1999, all three executives made false statements to the OCC examination team. *Ibid.* In April and May of 2002, co-conspirators also persisted in making false statements about the transactions to the SEC. *Id.* at 26; Pet. App. 3a, 9a.

2. On September 6, 2005, a federal grand jury in the Southern District of Florida returned a superseding indictment charging petitioner with one count of conspiracy, in violation of 18 U.S.C. 371 (Count 1); three counts of wire fraud, in violation of 18 U.S.C. 1343 and 2 (Counts 2-4); eight counts of bank fraud, in violation of 18 U.S.C. 1344 and 2 (Counts 5-12); one count of securities fraud, in violation of 15 U.S.C. 78j(b), 78ff(a), 18 U.S.C. 2 and 17 C.F.R. 240.10b-5 (Count 13); two counts of making false statements to the SEC, in violation of 15 U.S.C. 78m(a), 78ff(a), 18 U.S.C. 2, and 17 C.F.R. 240.12b-20, 240.13a-1, 240.13a-13 (Counts 14-

15); one count of obstruction of examination of a financial institution, in violation of 18 U.S.C. 1517 and 2 (Count 16); one count of making a materially false statement to a government agency, in violation of 18 U.S.C. 1001(a)(2) and 2 (Count 17); and one count of obstruction of agency proceedings, in violation of 18 U.S.C. 1505 (Count 18). Gov't C.A. Br. 1-2.

Petitioner's first trial resulted in a hung jury. Gov't C.A. Br. 2. Before his second trial, the district court ismissed on the government's motion the two counts (Counts 14-15) that charged petitioner with submittting false filings to the SEC in 1999. Pet. App. 14a. The jury then returned a guilty verdict on the remaining 16 counts. Gov't C.A. Br. 2.

3. Following the guilty verdict, the Probation Office prepared a Presentence Report (PSR) using the 2001 Sentencing Guidelines Manual, because the conspiracy charged in Count 1 continued into 2002 when petitioner's co-conspirators made false statements to the SEC. PSR Add. 2-4. Pursuant to Sentencing Guidelines § 2B1.1(b)(1)(L), the PSR increased petitioner's offense level by 22 because the total amount of loss was between $20 and $50 million. PSR para. 73. That loss had at least two different components: the bank reported losses totaling approximately $22.3 million, and investors reported losses totaling an additional $20.1 million. PSR paras. 48, 63; PSR Add. 9. With petitioner's adjusted offense level of 42 and criminal history category of I, the PSR calculated a Sentencing Guidelines range of 360 months to life imprisonment.[1] *Id.* para. 133. Pur-

[1] In addition to the increase based on the size of the loss, the PSR imposed a four-level increase for petitioner's role as an organizer or leader of extensive criminal activity, pursuant to Sentencing Guidelines § 3B1.1(a); a two-level increase for obstruction of justice, pursuant to

suant to 18 U.S.C. 3663A(a)(1), the PSR also determined that petitioner was required to make restitution of $11,665,703.40 to the Federal Deposit Insurance Corporation and of $20,091,979.62 to at least 111 victims. PSR paras. 140-143.

At sentencing, petitioner made several objections to the PSR. As relevant here, petitioner claimed that use of the 2001 Sentencing Guidelines Manual would violate the Ex Post Facto Clause and this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), "because the jury verdict did not include a specific finding that [petitioner's] conduct continued past November 1, 2001, the effective date of the 2001 Manual." 04-CR-20404-KMM Docket entry No. 506, at 3-4 (July 19, 2006) (Entry No.); see 7/26/06 Sent. Tr. 6-19 (Tr.). According to petitioner, the jury had found him guilty "of conspiring to obstruct the OCC investigation, *not* the SEC investigation." Entry No. 506, at 4. Petitioner did not argue that such a fact would disproportionately increase his sentence, nor did he address the standard of proof applicable to sentencing facts that would have such a disproportionate impact.

Petitioner also objected to the PSR's loss calculation on three grounds. Entry No. 506, at 8-13; Tr. 19-29. First, he argued that his conduct "did not cause [the] loss to the bank," because the Russian loans had declined in value before the swaps were orchestrated. Entry No. 506, at 9. Second, he argued that the losses to the bank "[were] almost entirely offset" by other par-

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Section 3C1.1; a four-level increase for injuring 50 or more victims, pursuant to Section 2B1.1(b)(2)(B); a two-level increase for use of sophisticated means, pursuant to Section 2B1.1(b)(8)(C); and a two-level increase for abuse of a position of trust, pursuant to Section 3B1.3. PSR paras. 74-75, 77-79.

ties' payments to the bank for the Russian loans. *Ibid.* Third, he argued that the government had not shown "that the decline in the price of [HB] stock was caused by the failure to recognize the loss associated with the alleged swap transactions" rather than "a general decline in all bank stocks." Entry No. 506, at 10.

The district court rejected petitioner's objections, and adopted the factual findings in the PSR. Tr. 19, 22, 23-25.[2] The district court then sentenced petitioner to concurrent terms of 60 months of imprisonment for conspiracy, obstruction, and false statements (Counts 1, 16, 17 and 18); 360 months of imprisonment for wire fraud and bank fraud (Counts 2-12); and 120 months of imprisonment for securities fraud (Count 13). Tr. 71; Entry No. 511, at 3 (July 26, 2006). The district court also ordered a total of five years of supervised release. Tr. 72; Entry No. 511, at 4. Following an evidentiary hearing on restitution, the district court ordered petitioner to make restitution in the total amount of $31,780,004.22, which reflected $17,233,435.10 for bank fraud and $14,546,569.12 for securities fraud.[3] Pet. App. 15a.

4. The court of appeals affirmed. Pet. App. 1a-15a. As relevant here, it rejected petitioner's renewed contention that using the 2001 Sentencing Guidelines Manual violated the Ex Post Facto Clause and his Sixth Amendment right to jury trial. The court of appeals held that because Count 1 charged a conspiracy "to 'commit one crime in two ways,' (i.e., conspiracy to defraud

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[2] In addition to rejecting the 2001 Sentencing Guidelines Manual and loss calculation objections, the district court also rejected petitioner's other objections, as well as his motion for a downward departure based on his health conditions.

[3] The district court's order miscalculates the total amount of restitution as $31,779,914.22 rather than $31,780,004.22. Pet. App. 15a.

the United States by obstructing the OCC or SEC)," Pet. App. 8a, the district court could find by a preponderance of the evidence that petitioner had conspired to obstruct the SEC in 2002. *Id.* at 8a-9a (citing *United States* v. *Riley*, 142 F.3d 1254 (11th Cir. 1998) (per curiam); *United States* v. *Edwards*, 105 F.3d 1179 (7th Cir. 1997), aff'd, 523 U.S. 511 (1998)). The court of appeals further noted that "[t]here was sufficient evidence presented at trial that obstruction of the SEC, perpetrated by [petitioner's] co-conspirators, was part of the conspiracy to defraud the United States." *Id.* at 9a n.4. Under the Sentencing Guidelines, "[i]n the case of a criminal conspiracy, the guidelines sentence shall be based on, inter alia, 'all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.'" *Ibid.* (quoting Sentencing Guidelines § 1B1.3(a)(1)(B)).

The court of appeals also affirmed the district court's loss calculation. Pet. App. 9a-11a. With respect to investors' total loss, the court of appeals observed that, under the Sentencing Guidelines, the district court needed only to make "a reasonable estimate of the loss." *Id.* at 10a. The court noted that the district court had carefully estimated the loss by limiting the class of claimants to those investors who had purchased after petitioner's fraudulent representations. *Ibid.* With respect to HB's total loss, the court of appeals concluded that "calculation of total loss between $20 and $40 million was not clearly erroneous." *Id.* at 11a. Although petitioner "may not have caused the Russian assets to decline in value, * * * his criminal activity did cause them to be sold when they were in fact worthless, and consequently, caused the $22 million loss to be realized by the bank." *Ibid.*

ARGUMENT

Petitioner contends that this Court should grant certiorari to determine (1) whether due process requires that facts with a disproportionate impact on sentencing be held to a heightened standard of proof (Pet. 10-20) and (2) whether the principles of loss causation articulated by this Court in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005), apply in the criminal sentencing context (Pet. 20-27). The first claim is raised for the first time before this Court, and the second claim was raised obliquely at best before the court of appeals and is not squarely presented on the facts of this case. Neither claim merits further review.

1. Petitioner contends (Pet. 10-20) that the circuits are split on whether due process requires a district court to apply a heightened standard of proof to determine a fact at sentencing "where the fact at issue would make a dramatic difference in the ultimate sentence." Pet. 10. Petitioner did not raise any such due process claim in either the district court or the court of appeals. Before those courts, petitioner argued only for different facts (*i.e.*, that he had not conspired in 2002 and had not caused more than $20 million in losses), not a different standard of proof. For that reason, petitioner's briefs before the court of appeals do not discuss due process, nor cite any of the cases on which he now relies (Pet. 11-17). See Pet. C.A. Br. 55-59; Pet. C.A. Reply Br. 25-27.

This Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992); see, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970), and every reason exists to adhere to that rule here. If

petitioner had raised that claim in the district court, that court might have made an alternative finding under a heightened standard of proof; at the least, the district court and the court of appeals could have addressed the legal issue. Furthermore, because petitioner did not raise this claim below, the claim would be reviewed for plain error. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725, 731-732 (1993). An error constitutes reversible plain error only if the defendant can show that (1) there was an error, (2) the error was obvious, (3) the error affected substantial rights, and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *United States* v. *Cotton*, 535 U.S. 625, 631-632 (2002). A case such as this, requiring those additional showings, would be an unsuitable vehicle for addressing the underlying legal question that petitioner has belatedly raised.

Since *Booker*, the courts of appeals have uniformly held that a sentencing judge may generally find facts relevant to determination of the advisory Sentencing Guidelines range by a preponderance of the evidence. See, *e.g.*, *United States* v. *Sanchez-Badillo*, 540 F.3d 24, 34 (1st Cir. 2008); *United States* v. *Grier*, 475 F.3d 556, 561 (3d Cir.) (en banc), cert. denied, 128 S. Ct. 106 (2007); *United States* v. *Kilby*, 443 F.3d 1135, 1140 (9th Cir. 2006); *United States* v. *Garcia*, 439 F.3d 363, 369 (7th Cir. 2006); *United States* v. *Vaughn*, 430 F.3d 518, 525 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Morris*, 429 F.3d 65, 72 (4th Cir. 2005), cert. denied, 549 U.S. 852 (2006); *United States* v. *Magallanez*, 408 F.3d 672, 685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Pirani*, 406 F.3d 543, 551 n.4 (8th Cir.) (en banc), cert. denied, 546 U.S. 909 (2005); *United States* v. *Yagar*, 404 F.3d 967, 972

(6th Cir. 2005); *United States* v. *Mares*, 402 F.3d 511, 519 & n.6 (5th Cir.), cert. denied, 546 U.S. 828 (2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 546 U.S. 940 (2005).

As petitioner notes (Pet. 11-15), however, both before and after *Booker*, the Ninth Circuit has taken the position that a sentencing factor that has "an extremely disproportionate effect on the sentence relative to the conviction" may require a district court to find that factor by clear and convincing evidence rather than by a preponderance of the evidence. Pet. 14; see *United States* v. *Staten*, 466 F.3d 708, 717 (2006). Because petitioner did not advocate that position in the courts below, this case is not an appropriate vehicle for the Court to decide whether the Ninth Circuit's position is correct.

Moreover, it is not clear that the Ninth Circuit would apply its standard for "extremely disproportionate" sentencing factors in this case. Thus far, the Ninth Circuit has limited the application of its standard to Sentencing Guidelines enhancements. See, *e.g.*, *United States* v. *Gonzalez*, 492 F.3d 1031, 1038-1039 (2007) (applying heightened standard to enhancement under Sentencing Guidelines § 2A5.2(a)(2)), cert. denied, 128 S. Ct. 1093 (2008); *Staten*, 466 F.3d at 717-720 (applying heightened standard to enhancement under Sentencing Guidelines § 2D1.1(b)(5)(B)); *United States* v. *Lynch*, 437 F.3d 902, 915-916 (en banc) (per curiam) (applying heightened standard to enhancement under Sentencing Guidelines § 2A1.1), cert. denied, 549 U.S. 836 (2006); see also *United States* v. *Dare*, 425 F.3d 634, 642 (2005) (declining to apply heightened standard to statutory mandatory minimum sentence), cert. denied, 548 U.S. 915 (2006); *United States* v. *Rosacker*, 314 F.3d 422, 430 (2002) (declining to apply heightened standard to drug

quantity approximation). The Ninth Circuit has not addressed whether its disproportionate impact test applies to facts that determine which Sentencing Guidelines Manual governs sentencing.

Likewise, the Eighth Circuit cases upon which petitioner relies (Pet. 14-15) do not militate in favor of further review. Although the Eighth Circuit has found that a due process challenge could survive Booker in theory, see *United States* v. *Archuleta*, 412 F.3d 1003, 1007 (2005), it has not sustained any such challenge in practice. As with the Ninth Circuit, it is not clear whether the Eighth Circuit would apply a heightened standard of proof to facts that determine which Sentencing Guidelines Manual governs sentencing.[4]

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[4] There is, in addition, a threshold question whether the district court's factual finding in this case was necessary to determine the applicable Sentencing Guidelines Manual. Congress has provided generally for use of the current version of the Sentencing Guidelines in effect on the day of sentencing. 18 U.S.C. 3553(a)(4). When the federal Sentencing Guidelines were considered mandatory, the courts of appeals uniformly held that ex post facto principles applied to determine which version of the Guidelines to apply. See, *e.g.*, *United States* v. *Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994) ("We thus join all of our sister circuits in holding that a guideline amendment which occurs after the commission of the defendant's crime which works to the defendant's detriment is inapplicable because it is a violation of the Ex Post Facto Clause."). Since *Booker*, the Seventh Circuit has held that the Ex Post Facto Clause does not apply to changes in the Sentencing Guidelines now that they are advisory, *United States* v. *Demaree*, 459 F.3d 791 (2006), cert. denied, 127 S. Ct. 3055 (2007), while the District of Columbia Circuit has reached the opposite conclusion, see *United States* v. *Turner*, No. 07-3107 (Dec. 5, 2008). If, as the government now believes and as the Seventh Circuit has held, the Ex Post Facto Clause does not apply to advisory Sentencing Guidelines, petitioner would not have been entitled to use of the 2000 version of the Sentencing Guidelines Manual regardless of the district court's factual finding.

Even if there were a clear conflict, this case would not necessarily provide an occasion to resolve it, in light of the plain-error standard of review. As petitioner points out (Pet. 12-13), several circuits have concluded that the disproportionate impact test is no longer viable after *Booker*.[5] Given the division among the circuits, petitioner could not possibly show that the district court's selection of the 2001 Sentencing Guidelines Manual based on a preponderance of the evidence was plain error. See, *e.g.*, *United States* v. *Williams*, 469 F.3d 963, 966 (11th Cir. 2006) (no plain error where there is no controlling case law and circuits are split); *United States* v. *Teague*, 443 F.3d 1310, 1319 (10th Cir.) (same), cert. denied, 549 U.S. 911 (2006).

2. Petitioner contends (Pet. 20-27) that the circuits are split on whether the principles of loss causation articulated by this Court in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. at 336, apply when calculating shareholder losses during criminal sentencing. Petitioner did not cite *Dura* in either the district court or the court of

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[5] See, *e.g.*, *United States* v. *Fisher*, 502 F.3d 293, 307 (3d Cir. 2007) ("After *Booker*, the offense of conviction is defined by the United States Code; thus, a reasonable sentence which does not exceed the maximum prescribed by the Code cannot possibly be disproportionate to the offense of conviction.") (internal quotation marks and citation omitted), cert. denied, 128 S. Ct. 1689 (2008); *United States* v. *Brika*, 487 F.3d 450, 460-462 (6th Cir.) (challenges to "large enhancement * * * should be viewed through the lens of *Booker* reasonableness rather than that of due process"), cert. denied, 128 S. Ct. 341 (2007); *United States* v. *Reuter*, 463 F.3d 792, 793 (7th Cir. 2006) (debate over disproportionate impact test has been "rendered academic" by *Booker*), cert. denied, 127 S. Ct. 1163 (2007); *Vaughn*, 430 F.3d at 525 ("[A]fter *Booker*, district courts' authority to determine sentencing factors by a preponderance of the evidence endures and does not violate the Due Process Clause of the Fifth Amendment.").

appeals. Before both courts, petitioner argued (without ever citing *Dura*) that the government's evidence did not establish proximate causation. In petitioner's view, the evidence showed that the decline in HB's stock price was tied to a general market decline, not his criminal conduct. Pet. C.A. Br. 62; Docket entry No. 506 at 10. While in the court of appeals, petitioner did cite, *inter alia*, *United States* v. *Olis*, 429 F.3d 540, 545-546 (5th Cir. 2005), see Pet. C.A. Br. 60, which did cite *Dura*, 429 F.3d at 546, petitioner did not specifically develop an argument based on *Dura*. The court of appeals, in turn, did not discuss *Dura* or petitioner's current argument in favor of borrowing its loss causation principles in the Sentencing Guidelines context.

Even assuming that petitioner did adequately present the issue below, the issue would not merit review. Apart from the district court's calculation of *shareholders'* losses, the court separately found that *Hamilton Bank's* losses from the ratio swaps and the inflated bonuses paid to the conspirators exceeded $22 million. As the court of appeals explained, petitioner's criminal activity in trying to hide the Russian loans "cause[d] them to be sold when they were in fact worthless, and consequently, caused the $22 million loss to be realized by the bank." Pet. App. 11a. While petitioner did not cause the loans to decline in value, he sold them before their value could rebound; he overpaid for the assets acquired in return; and he pocketed an annual bonus as a result of the entire scheme. Gov't C.A. Br. 63-64. The combined total of those losses was at least $20 million, thus triggering the 22-level sentencing enhancement under Sentencing Guidelines § 2B1.1(b)(1)(L). Accordingly, petitioner's arguments relating to calculation of shareholder losses under *Dura* have no bearing on petitioner's sen-

tence, making this case an inappropriate vehicle for resolving any alleged split among the circuits on the applicability of *Dura* when calculating shareholder losses for purposes of criminal sentencing.

Petitioner asserts (Pet. 26) that "the court's refusal to consider *Dura* likewise impaired its assessment of loss to the bank," because "loss causation is a specific application of the more general principle of *proximate cause*." Petitioner's assertion misses the mark as both a factual and a legal matter. As a factual matter, the court of appeals did not set aside the requirement of proximate causation. It simply found that the government had adduced sufficient evidence to show that petitioner's criminal conduct caused HB losses of over $22 million. Review of that factual finding for clear error is not warranted. As a legal matter, the cases petitioner cites in support of his claim address only shareholder losses and not any "more general principle." See *United States* v. *Rutkoske*, 506 F.3d 170, 173-174 (2d Cir. 2007), cert. denied, 128 S. Ct. 2488 (2008); *United States* v. *Zolp*, 479 F.3d 715, 719-721 (9th Cir. 2007); *Olis*, 429 F.3d at 548-549. Petitioner therefore identifies no circuit split on this issue.

Finally, even if the courts of appeals were in conflict over the application of loss-calculation principles under Guidelines § 2B1.1, this Court's intervention would not be warranted. *Dura* was a statutory case involving a private civil securities fraud action, and it has no direct application to determination of loss under the Sentencing Guidelines. In any event, because petitioner's challenge concerns only a question of the proper application of a Sentencing Guidelines provision, the Sentencing Commission could eliminate any conflict. Congress has charged the Sentencing Commission with "periodically

review[ing] the work of the courts, and * * * mak[ing] whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). Because the Sentencing Commission can amend the Sentencing Guidelines to eliminate a conflict or correct an error in their construction, this Court ordinarily will not review decisions interpreting and applying the Sentencing Guidelines. See *id.* at 347-349. That practice is particularly appropriate now that the Guidelines are only advisory. See *United States* v. *Booker*, 543 U.S. 220 (2005).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 08-118

In the Supreme Court of the United States

EDUARDO A. MASFERRER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner's 30-year sentence is at least twice—and likely three times—what he would have faced if the district court had not found two critical facts by a simple preponderance of the evidence and employed a loss causation analysis that has been soundly rejected for use in civil litigation (and by some circuits for use in criminal litigation). In other circuits, petitioner would have been entitled to (1) a heightened review of the facts supporting such a disproportionate increase to his sentence and (2) a loss causation analysis adhering to the principles articulated in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005).

The government expressly acknowledges the "division among the circuits" on the first question presented, Opp. 12, and does not dispute that the circuits are also split on the second, see Opp. 12-15. Instead, the government contends that petitioner did not adequately raise those precise issues below, and that neither circuit split requires resolution here. The government is wrong on both counts.

1. Contrary to the government's assertion (see Opp. 8), petitioner squarely asked the courts below to apply a more exacting standard than simple preponderance of the evidence before finding facts that had a substantial and disproportionate impact on his sentence. And, notwithstanding the government's hope that the conflict on this issue will dissipate after *Booker*, it is clear that the circuits remain deeply divided. This question is squarely presented here and merits this Court's review.

a. In terse rulings from the bench, the district court adopted two facts based on the presentence report: that petitioner's relevant conduct continued after the adoption of the 2001 Sentencing Manual, and that petitioner's offense caused losses exceeding $20 million. Based on those findings, the district court added at least 17½ years to petitioner's sentence in an otherwise garden-variety fraud case. At the very first opportunity to object—petitioner's Objections to the Presentence Report and Motion for Downward Departure—petitioner explicitly argued that "[g]iven the potential effect on his offense level * * * the standard of proof for showing loss should be higher than a preponderance of the evidence." 04-CR-20404-KMM Docket Entry No. 506, at 10 (July 19, 2006) ("Dkt."). At the sentencing hearing, petitioner's counsel preserved this objection in language that could hardly be clearer:

> I just want to make sure that I have preserved my objection on the issue of the standard of proof because now we are in a situation because of the amount of the loss that the proverbial tail is going to wag the dog in the sentence, and so we would ask for a higher standard of proof than preponderance. I just want to make sure that that objection we put in writing is preserved.

July 26, 2006, Tr. 25. The district court responded with equal clarity when it denied that objection, stating that "the standard that I'm applying is a preponderance of the evidence." *Ibid.* It applied the 2001 Sentencing Manual's enhancement for losses greater than $20 million. *Id.* at 22. "I understand," the sentencing judge added, "that the amount of the

loss is the tail that wags the dog" in petitioner's case. *Id.* at 25.

Petitioner continued to press this issue before the court of appeals. See, *e.g.*, Pet. C.A. Reply Br. 27 (arguing that the district court inappropriately "found *by a preponderance of the evidence*" that petitioner's conduct continued into 2002). The court of appeals held that, despite the substantial increase to petitioner's sentence, "the [district] court was simply required to find by a preponderance of the evidence" that petitioner's conduct continued past November 1, 2001, Pet. App. 8a-9a, and to have made only "a reasonable estimate of the loss" under that same standard, *id.* at 10a. Because petitioner clearly raised his objection to the preponderance standard in the proceedings below, it is simply not true that "petitioner argued only for different facts" and "not a different standard of proof." Opp. 8; see also *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002) ("Any issue pressed or passed upon below by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari * * *.").

It is also clear that petitioner preserved this argument with respect to each of the two factual findings that caused the dramatic increase to his sentence. At issue here is a single sentencing enhancement under U.S.S.G. § 2B1.1(b)(1) of the 2001 Sentencing Manual, and the resulting boost to petitioner's sentence of at least 17½ years. In order to apply that disproportionate increase, the district court had to find *both* that petitioner's conduct continued after November 1, 2001, *and* that his conduct caused more than $20 million in losses. It is difficult to see how petitioner's objection to this

enhancement on the ground that he was entitled to a heightened standard of proof could have applied to one necessary fact but not to the other. In any event, even if petitioner did not articulate at the time that his clear objection to the standard of proof extended to both facts, petitioner nevertheless properly raised this claim below and preserved the first question presented for this Court's review. See *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

b. Respondent recognizes the "division among the circuits," Opp. 12, on the standard of proof a judge should apply to fact-finding that may result in disproportionate sentencing increases. Indeed, this Court has acknowledged that division. See *United States* v. *Watts*, 519 U.S. 148, 156-57 & n.2 (1997); see also Pet. 12. The government argues that the split did not survive *United States* v. *Booker*, 543 U.S. 220 (2005), but that assertion is plainly wrong. Both the Eighth and Ninth Circuits have addressed this issue since *Booker*, and they remain squarely opposed to the Eleventh Circuit and others on this question.

In *United States* v. *Archuleta*, 412 F.3d 1003 (8th Cir. 2005), the court of appeals reviewed a defendant's sentence to determine whether "judge-found facts" under a preponderance standard resulted in "such an increase [to defendant's sentence] that we would say the enhancements were the tail that wagged the substantive offense," *id.* at 1007. "Nothing in *Booker*," the court held, "changes the interpretation" of that principle. *Ibid.* The Eighth Circuit has reaffirmed that position since the

filing of this petition. See *United States* v. *Garth*, 540 F.3d 766, 773 n.2 (Sept. 3, 2008) (acknowledging a circuit split and stating that the Eighth Circuit has "summarily dismissed the argument that the tail can no longer wag the dog now that the Guidelines are advisory").

Likewise, the Ninth Circuit has applied ("both before and after *Booker*," Opp. 10) its heightened standard of proof whenever any "sentencing factor has an extremely disproportionate effect on the sentence relative to the conviction." *United States* v. *Lynch*, 437 F.3d 902, 916 (9th Cir. 2006) (en banc) (per curiam); see also *United States* v. *Staten*, 466 F.3d 708, 718 (9th Cir. 2006) (en banc) ("[T]he clear and convincing standard still pertains post-*Booker* for an enhancement applied by the district court that has an extremely disproportionate effect on the sentence imposed.").

The government claims that the Eighth Circuit's cases should be disregarded because, although that court expressly applied a heightened standard of proof and rejected the Government's *Booker* argument, it found the evidence sufficient to support the sentences. But surely the Eighth Circuit is no less opposed to the Eleventh on this issue merely because it has not had occasion to vacate a sentence under that Circuit's heightened standard of proof. The government's apparent belief that the court will reverse course in a case where that standard results in relief for a defendant is mere wishful thinking.

As to the Ninth Circuit, the government concedes that that circuit continues to apply a heightened standard of proof to facts that disproportionately

increase a defendant's sentence. See Opp. 10. And the government does not dispute that the Ninth Circuit would apply a heightened standard to loss calculations that, as in this case, have such a disproportionate effect. See *id.* at 10-11. Nonetheless, the government hypothesizes that the Ninth Circuit may someday choose not to apply its heightened standard to findings regarding the timing of criminal conduct even where, as here, that fact has the same disproportionate impact on a defendant's sentence. The Ninth Circuit has not actually carved out such an exception, of course, and respondent offers no logical reason to expect that it would do so. See *Lynch*, 437 F.3d at 916 (applying heightened standard to any "sentencing factor"). Respondent has proffered the mere possibility that the court may draw a distinction without a difference, as though cases in which the tail wags the dog might somehow end up turning on the color of the tail.[1]

2. The government's attempt to dodge the second question presented is equally unavailing. As explained in our petition (at 21-23), whether *Dura*'s loss causation principles apply in criminal securities fraud prosecutions has deeply divided the courts of appeals. The government finds fault with the way in which petitioner presented this argument to the

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[1] No "threshold question" prevents this Court's review in this case. See Opp. 11 n.4. The longstanding application of ex post facto principles to the Sentencing Guidelines is not at issue here. The Eleventh Circuit continues to apply those principles, see *United States* v. *Aviles*, 518 F.3d 1228 (2008) (vacating and remanding for resentencing because "the district court should use the appropriate Guidelines Manual under an ex post facto analysis"), and it applied that analysis to this case, see Pet. App. 8a-9a.

courts below, but it is beyond serious doubt that petitioner squarely presented this claim. Moreover, the fundamental importance of this question—in effect, whether a criminal defendant's *liberty* should be afforded the same protections as a civil defendant's *money*—cannot be overstated. This Court's review is urgently needed, both to remedy the serious injustice petitioner has suffered in this case and to prevent scores of other defendants from facing a similar fate.

a. Petitioner far more than "obliquely" objected to the district court's rejection of the loss causation principles articulated in *Dura*. See Opp. 8. Indeed, as detailed below, petitioner devoted pages of briefing and substantial oral argument to his contention that the district court impermissibly calculated losses by a method that, as a matter of law, did not reflect actual economic losses that were proximately caused by his conduct. See *Dura*, 544 U.S. at 342-47.

To explain and support his objection, petitioner pointed both the district court and the court of appeals directly to the leading case that has applied *Dura*'s loss causation principles to criminal sentencing. See Pet. C.A. Br. 60, 62 (citing *United States* v. *Olis*, 429 F.3d 540, 545-46 (5th Cir. 2005)); Dkt. 506, at 10 (same). On the very pages of *Olis* that petitioner cited, the Fifth Circuit explained that *Dura*'s "well-established" principles of loss causation "should be the backdrop for criminal responsibility." 429 F.3d at 546. Moreover, petitioner quoted from the *Olis* court's holding that if asset values decline for reasons other than a defendant's misrepresentation, "such decline, or component of the decline, is not a 'loss' attributable to the misrepresentation." Pet. C.A. Br. 62 (quoting *Olis*, 429 F.3d at 546); Dkt. 506, at 10

(same); see also Pet. 21-23 (quoting similar statements of the law in the Second and Ninth Circuits).

Petitioner's argument did not escape the attention of the courts below. At the sentencing hearing, for example, the district court plainly understood (and expressly rejected) petitioner's argument:

> I know that you're arguing * * * that you have to find that the loss that investors may have suffered was directly attributable to the fraud, and I understand that may be the requirement in your *typical* securities fraud case. I don't think it's the applicable law when it comes to calculating loss for sentencing guideline purposes in this *criminal* case.

July 26, 2006, Tr. 24 (emphasis added); see also *id.* at 27 (defense counsel stating that it "is not law" to attribute "every loss suffered by any victim over a two-year period * * *, the entire loss, to the alleged misrepresentations").

Despite all this, the government suggests that petitioner did not preserve this issue for further review because he "did not *specifically* develop an argument based on *Dura*," Opp. 13 (emphasis added). Respondent apparently faults petitioner for not *also* citing *Dura* when he cited cases that apply *Dura* to criminal sentencing. It is quite clear, however, that petitioner more than adequately (and, indeed, quite frequently) raised this issue below, and that the lack of a particular citation presents no barrier to this Court's review. What is more, the notion that petitioner's reliance on the Fifth Circuit's *Olis* decision somehow disguised petitioner's true

argument is baseless. The saga of Jamie Olis—who was initially sentenced to 292 months' imprisonment before this Court declared the sentencing guidelines advisory—has been followed by criminal practitioners across the country. The Fifth Circuit's adoption of *Dura*'s loss causation principles and their application when Olis was resentenced likewise garnered widespread attention. See, *e.g.*, Thomas S. Mulligan & Jonathan Peterson, *Dynegy Sentence Overturned: A Federal Appeals Court Reverses Jamie Olis' 24-year Prison Term Saying It Was Based On Inflated Loss Figures*, L.A. Times, Nov. 2, 2005, at C3. There is simply no merit to the government's claim that petitioner failed to preserve this issue.

At the end of the day, if the Eleventh Circuit had followed the rule adopted in the Second, Fifth, and Ninth Circuits—which, the government does not dispute, squarely apply *Dura*'s principles to criminal sentencing, see Opp. 12-15—it would have fundamentally changed the attribution of shareholder and bank losses to the defendant's conduct. Respondent briefly argues that application of *Dura*'s principles would have "no bearing on petitioner's sentence." Opp. 13-14. But that assertion simply begs the question—how *Dura* should apply to criminal sentencing—on which petitioner now seeks this Court's review.

The district court inappropriately attributed the *entire* declines in the values of both the shareholders' securities and the bank's swap assets to petitioner's conduct, and neither calculation attempted to arrive at the "actual economic loss" proximately caused by petitioner's conduct. See *Dura*, 544 U.S. at 344. As to the bank's alleged losses, the government's own

witness agreed that "under the government's theory" the bank sustained nearly all of its losses by September 1998 (before petitioner's conduct), and that petitioner's conduct simply caused the *recognition* of those losses as an accounting matter in December 2000. See Sep. 8, 2006, Tr. 68-70. If the district court had not rejected the application of *Dura* to this case, it would have had to reconsider, and likely revise, its findings as to both sources of loss.

b. In a final attempt to defeat review of petitioner's 30-year sentence, the government relies on the possibility that the Sentencing Commission could one day resolve the circuit conflict over the application of *Dura*'s loss causation principles. That mere hope is no answer to the clear and entrenched conflict on this important and recurring question of federal law. There is no indication that the Sentencing Commission intends to resolve the division of the circuits on this issue or that it would do so with retroactive effect in petitioner's case; nor, as in *Braxton* v. *United States*, 500 U.S. 344, 348-49 (1991), can this Court decide this specific controversy on any other ground.

More to the point, the government's assertion is scant comfort to petitioner (and numerous other defendants) who have been (or will be) sentenced to grossly excessive prison terms under a methodology that would be thrown out of court in a civil case. *Dura* affords *civil* securities fraud defendants meaningful assurances that they will be held responsible only for losses actually caused by their conduct. Surely *criminal* defendants should not face years of additional prison time—here, nearly two decades' worth without a similarly rigorous showing.

This issue is squarely presented here, ripe for review, and of paramount importance to the fair administration of the federal criminal justice system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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